IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

BRIAN BOWEN II, Plaintiff, v. ADIDAS AMERICA, INC.; JAMES GATTO; MERL CODE; CHRISTIAN DAWKINS; MUNISH SOOD; THOMAS GASSNOLA; and CHRISTOPHER RIVERS Defendants.	)	Civil Action No.: 3:18-3118-JFA

PLAINTIFF'S CONSOLIDATED MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS THE AMENDED COMPLAIN

TABLE OF CONTENTS

TABLE OF CASES

Plaintiff Brian Bowen II ("Brian") respectfully submits his Response in Opposition to the motions to dismiss the amended complaint filed by Defendants Merl Code (ECF No. 93), Adidas America, Inc. (Dkt. No. 94), James Gatto (ECF No. 95), Munish Sood (ECF No. 96), and Christopher Rivers (Dkt. No. 97) (collectively, "Defendants"). For the reasons set forth below, Defendants' motions should be denied in their entirety and this case should proceed to discovery.

PRELIMINARY STATEMENT

When Brian Bowen was a senior in high school, he could have joined any number of top NCAA Division I men's basketball programs and earned an education while preparing for his professional basketball career. Brian committed to the University of Louisville ("UofL") after being led to believe it was the best basketball fit for him, that he could develop into a first-round NBA draft pick after playing one or two seasons under its hall of fame coach, and that he could turn pro at the time of his choosing when his draft stock was at its peak. Unbeknownst to Brian, he was the target of a long-running scheme by Defendants to steer the country's best high school basketball players to Adidas-sponsored programs through fraud and deceit. As a result, his college basketball career ended long before he could play a single game for the Louisville Cardinals.

Defendants Adidas, Gatto, Rivers, Gassnola, Code, Sood, and Dawkins saw Brian as a mere asset—someone upon whom Adidas could affix its three-stripe logo and trot out in front of televised crowds of millions of fans. So long as they could ensure Brian attended Adidas's flagship-sponsored University of Louisville—and not a rival school sponsored by Nike or Under Armour—his presence on the court would generate millions of dollars for them during his "amateur" playing days and still more once he turned pro. This tried and true scheme had proven effective in years past—paying bribes to unsophisticated parents and guardians of the country's top high school basketball players to steer their sons to Adidas-sponsored programs, concealing

knowledge of the bribery scheme from those players so they would commit to the schools pushed on them, and defrauding the universities into awarding scholarships to those players who would be rendered ineligible by the bribery scheme. The amended complaint sets forth Defendants' extensive scheme in detail, how they worked to conceal it from the student-athletes, including Brian, with devastating consequences to their collegiate and professional careers. It includes *fifty* new exhibits unearthed from the criminal trial—text messages, emails, wire transfers, bank statements, and transcripts of telephone wiretaps—unambiguously establishing how the Adidas Bribery Enterprise engaged in wire fraud and money laundering to bring unsuspecting athletes to Adidas-sponsored universities.[1] The new allegations and exhibits clearly establish Defendants' repeated use of interstate wire transmissions in furtherance of their schemes to defraud the student-athletes and universities in violation of federal wire fraud and money laundering statutes.

Faced with overwhelming and detailed allegations and evidence of their criminality, Defendants Adidas, Gatto, Code, and Sood completely ignore the majority of the amended complaint and virtually all of the exhibits, choosing instead to isolate a handful of statements in the pleading and then summarily conclude that because a certain sentence or paragraph did not repeat verbatim the hundreds of supporting allegations that preceded it, the entire complaint lacks particularity. Defendants muster these conclusory arguments without undertaking any effort to explain *why* each of the freshly detailed allegations and authenticated exhibits of actual wire transmissions used in furtherance of their schemes lack specificity or *why* each is insufficient to establish a pattern of racketeering activity. For example, Defendant Gatto remarkably claims that the amended complaint "did not add any supporting allegations to the assertion that Defendants

[1] The exhibits to the amended complaint labeled with a yellow "Government Exhibit" sticker were provided to Plaintiff's counsel by the U.S. Attorney's Office for the Southern District of New York. These exhibits were admitted into evidence in the October 2018 criminal trial of Gatto, Code, and Dawkins.

reviewed and approved sham invoices related to payment to Plaintiff's father," despite the complaint including authenticated copies of the invoices approved by him—including one with his *handwritten signature of approval*—along with accounting records and emails directing they be paid. Defendants' apparent preference to hide from these allegations and exhibits is fatal to their arguments for dismissal. And while Defendant Rivers acknowledges the specific allegations of wire fraud against him, his arguments for dismissal ultimately fail because they misapprehend that, he too, engaged with the enterprise in multiple predicate acts of wire fraud *and money laundering*, including his participation in the UofL scheme that caused Plaintiff's injury.

In arguing with blinders on, Defendants fail to answer the most obvious question in the wake of Brian's amended pleading: why authenticated evidence of fraudulent invoices and payment approvals, bank wire transfer instructions and statements, internal Adidas emails and accounting records indicating approvals of false invoices, and transcripts of wiretapped telephone calls and text messages that disclose in embarrassing and full detail the "who, what, when, where, and how" of the bribery scheme fail to provide them with sufficient particularity in order to understand the claims brought against them? In truth, Defendants have no good basis to deny the sufficiency of the allegations and evidence set forth in the amended complaint, as there can be no more particularized detail of their wire fraud than the actual evidence used to convict many of them of it. The same exhibits in the amended complaint were used by federal prosecutors to secure convictions in the criminal trial of Gatto, Code, and Dawkins—a trial in which Sood and Gassnola were confronted with the same evidence during their testimony, a trial in which Adidas subsidized the defense, and a trial that the company monitored daily through an attorney placed inside the New York City courtroom. While Defendants have a right to move for dismissal under Rule 12(b)(6), they unquestionably lack any basis to feign ignorance of the facts alleged against them.

LEGAL STANDARDS

A civil complaint need only contain "a short, plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Because a motion to dismiss is not a procedure for resolving a contest between the parties about the facts or the substantive merits of the plaintiff's case, a court must construe the complaint in the light most favorable to the plaintiff and take the facts asserted as true. *See Republican Party of N. Carolina v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992). A complaint will survive a Rule 12(b)(6) motion to dismiss if it "contain[s] sufficient factual matter to 'state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Plausibility "does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence" of the alleged misconduct. *Bell Atl. Corp. v. Twombley*, 550 U.S. 544, 556 (2007).

Claims brought under the civil RICO statute are to be interpreted broadly. "This is the lesson not only of Congress's self-consciously expansive language and overall approach," *see Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497-98 (1985), but also of the statute's express mandate that it is to "be liberally construed to effectuate its remedial purposes." *Boyle v. United States*, 556 U.S. 938, 944 (2009). The statute's "'remedial purposes' are nowhere more evident than in the provision of a private action for those injured by racketeering activity." *Sedima*, 473 U.S. at 498. To this end, RICO makes it unlawful for an individual or corporation to conduct the affairs of an enterprise through a "pattern of racketeering activity." 18 U.S.C. § 1962(c). These acts of racketeering include "any act which is indictable" as one of dozens of state or federal crimes, including wire fraud and money laundering. 18 U.S.C. § 1961(1)(B).

Importantly, a civil RICO complaint need not plead *different types* of predicate acts of racketeering; rather, the statute requires only that defendants engaged in a *pattern* of racketeering,

which in many cases includes multiple violations of the same underlying "predicate act" of racketeering.[2] *See, e.g.*, *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 642 (2008) (involving multiple predicate acts of mail fraud); *Jones v. Ram Med., Inc.*, 807 F. Supp. 2d 501, 512 (D.S.C. 2011) (involving multiple predicate acts of trafficking in counterfeit goods).

When fraud is alleged as a predicate act of racketeering, only the circumstances constituting the specific fraudulent acts are required to be pled with particularity in accordance with Federal Rule of Civil Procedure 9(b). *Jones*, 807 F. Supp. 2d at 513. If, however, "wire fraud was only used in furtherance of a scheme to defraud, then the complaint does not have to be as specific with respect to each allegation of mail or wire fraud, so long as the RICO scheme is sufficiently pled to give notice to the defendants." *M'Baye v. New Jersey Sports Prod., Inc.*, No. 06 CIV.3439 DC, 2007 WL 431881, at *7 (S.D.N.Y. Feb. 7, 2007). This is because Rule 9(b) exists to ensure a defendant "has sufficient information to formulate a defense by putting it on notice of the conduct complained of," as well as "to eliminate fraud actions in which all the facts are learned after discovery." *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999). When the alleged fraud is based on concealment or omissions of material fact, as happened in this case, the Rule 9(b) particularity standard is necessarily relaxed because an omission "cannot be described in terms of the time, place, and contents of the misrepresentation or the identity of the person making the misrepresentation." *Shaw v. Brown & Williamson Tobacco Corp.*, 973 F. Supp. 539, 552 (D. Md. 1997). For this reason, "[a] court should hesitate to dismiss a complaint under Rule 9(b) if the court is satisfied (1) that the defendant has been made aware of

[2] Adidas and Rivers appear to interpret the statutory "pattern" requirement of pleading two or more acts of racketeering to require pleading different kinds of predicate acts from the list enumerated in 18 U.S.C. § 1961(1). *See* Adidas Mot. (ECF No. 94-1 at 9 (arguing the Amended Complaint "alleges two kinds of racketeering activity, wire fraud and money laundering."); Rivers Mot. (ECF No. 97-1 at 2 ("Needing to allege two predicate acts of racketeering to keep his RICO claims alive, Plaintiff was left with only one predicate act—money laundering.") The "kind" of racketeering activity engaged in is irrelevant to whether a complaint properly pleads a pattern of racketeering activity.

the particular circumstances for which she will have to prepare a defense at trial, and (2) that plaintiff has substantial prediscovery evidence of those facts." *Id.*

Finally, though a party may move for dismissal of a pleading within the prescribed time under Rule 12(b)(6), an amended pleading does not give the responding party an entirely new opportunity to assert defenses that could have been raised in response to the original pleading. *See Rowley v. McMillan*, 502 F.2d 1326, 1333 (4th Cir. 1974) ("[W]e agree that an amendment to the pleadings permits the responding pleader to assert only such of those defenses which may be presented in a motion under Rule 12 as were not available at the time of his response to the pleading. An unasserted defense available at the time of response to an initial pleading may not be asserted when the initial pleading is amended."); *Maxtena, Inc. v. Marks*, No. DKC 11-0945, 2012 WL 113386, at *11 (D. Md. Jan. 12, 2012); *see also* 2A Moore's Federal Practice § 12.22 ("Amendment of the complaint ... does not revive the right to interpose defenses or objections which might have been made to the original complaint.").

ARGUMENT

I. THE AMENDED COMPLAINT PROPERLY ALLEGES DEFENDANTS ENGAGED IN A PATTERN OF WIRE FRAUD

Defendants engaged in a pattern of wire fraud in executing their schemes to defraud Brian and the other student-athletes into signing with Adidas-sponsored schools under false pretenses, and in defrauding the targeted universities of their limited athletic-based scholarships in violation of 18 U.S.C. § 1343. A civil RICO plaintiff may allege predicate acts targeting other victims when establishing evidence of a "pattern of racketeering activity." *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 (1985). The Fourth Circuit and other federal courts of appeal have long recognized that a RICO plaintiff need not have suffered an injury arising from any of the prior acts forming the pattern of racketeering; rather, a plaintiff need only allege an injury based solely on a

single predicate act sufficiently related to the pattern of prior acts committed in furtherance of the scheme. *See Busby v. Crown Supply, Inc.* 896 F.2d 833, 838 (4th Cir. 1990) (finding a plaintiff can assert a RICO claim even if his injuries resulted from only some of the predicate acts in the pattern of racketeering activity); *Deppe v. Tripp*, 863 F.2d 1356, 1366 (7th Cir. 1988) ("[N]o requirement exists that the plaintiff must suffer an injury from two or more predicate acts, or from *all* of the predicate acts."); *Marshall & Ilsley Tr. Co. v. Pate*, 819 F.2d 806, 809-10 (7th Cir. 1987) ("We do not believe that a plaintiff, in order to state a claim under section 1964(c), must allege an injury to its business or property either caused by at least two predicate acts, or caused by *all* the acts adding up to a pattern. . . . It would be illogical to require a plaintiff to show that all the acts adding up to a 'pattern' injured him, especially in view of the fact that many such acts may be somewhat distinct and separate in time."); *Town of Kearny v. Hudson Meadows Urban Renewal Corp.*, 829 F.2d 1263, 1268 (3d Cir. 1987) ("Reading into the statute a requirement that a civil plaintiff prove injury from the entire pattern rather than from any predicate act would, we believe, be inconsistent with the core congressional purposes behind its enactment.").

To plead a violation of the federal wire fraud statute, a complaint need only allege "(1) the existence of a scheme to defraud and (2) the use of . . . a wire communication in furtherance of the scheme." *United States v. Jefferson*, 674 F.3d 332, 366 (4th Cir. 2012), *as amended* (Mar. 29, 2012) (quoting *United States v. Curry*, 461 F.3d 452, 457 (4th Cir. 2006)). Any wire communication incident to a scheme to defraud violates the statute, "even if the [wiring] itself contains no false information." *United States v. Kohn*, No. 2:09-1127-PMD, 2010 WL 1791258, at *7 (D.S.C. May 3, 2010) (citing *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 647 (2008)). Because "[i]t is the physical act of transmitting the wire communication for the purpose of executing the fraud scheme that creates a punishable offense," the wire fraud statute

"criminalizes each wire transmission in furtherance of a single fraud scheme," not merely "the existence of a scheme to defraud." *Jefferson*, 674 F.3d at 367 (emphasis added); *see also United States v. Allen*, 491 F.3d 178, 181–84 (4th Cir. 2007) (affirming convictions on multiple counts of wire fraud arising from a single scheme to defraud).

The amended complaint properly alleges each of the elements of wire fraud with the required specificity in describing Defendants' "pattern" of wire fraud targeting Dennis Smith, Jr., Billy Preston, Silvio DeSousa, N.C. State, the University of Kansas, and the University of Miami, as well as alleging detailed instances of wire fraud specifically targeting Brian and the University of Louisville. In executing these schemes, Defendants engaged in dozens of wire transmissions—each one a separate violation of the federal wire fraud statute and, thus, each a separate predicate act of wire fraud that, collectively, form a pattern of racketeering activity. Accordingly, because at the pleadings stage it is only necessary to determine that Plaintiff has alleged enough instances of wire fraud with required specificity to establish a pattern of racketeering activity, the Court need not determine now whether every act of wire fraud alleged in the amended complaint meets the specificity requirement of Rule 9(b). *See Bd. of Managers of Trump Tower at City Ctr. Condo. by Neiditch v. Palazzolo*, 346 F. Supp. 3d 432, 461 n.2 (S.D.N.Y. 2018) ("Because Plaintiff has adequately pled the two RICO predicates of wire fraud and mail fraud, the Court need not address the Plaintiff's allegations regarding the acts of bank fraud."). Moreover, because the Court already found that "Plaintiff has pled sufficient material to allege plausible claims to relief" with respect to predicate acts of money laundering, (ECF No. 82 at 8), those acts of money laundering should be viewed alongside the wire fraud allegations to conclude the amended complaint sufficiently alleges a pattern of racketeering activity. *Id.*

A. Defendants Schemed to Defraud Student-Athletes and Universities

A scheme to defraud is simply a plan, intention or state of mind "to deprive one of something of value through a misrepresentation or other similar dishonest method." *United States v. Wynn*, 684 F.3d 473, 478 (4th Cir. 2012). Importantly, a scheme to defraud "is not itself conduct at all (although it may be made manifest by conduct)," but rather is the *mens rea* element of the offense. *Jefferson*, 674 F.3d at 367-68. The wire fraud statute "requires only that the subject scheme be devised, not that it be participated in." *Jefferson*, 674 F.3d at 367-68; *see also id.* ("Requiring an additional showing of participation in the scheme impermissibly engrafts a conduct component onto a pure intent element."). Thus, to establish a scheme to defraud, a plaintiff need allege only that a defendant "acted with the *specific intent to defraud*, which 'may be inferred from the totality of the circumstances and need not be proven by direct evidence.'" *United States v. Godwin*, 272 F.3d 659, 666 (4th Cir. 2001), quoting *United States v. Ham*, 998 F.2d 1247, 1254 (4th Cir. 1993). Moreover "the necessary intent to defraud requires [only] that the defendant specifically intend to deceive or cheat *someone*." *United States v. Sauls*, No 18-4454, 2019 WL 386409, at *1 (4th Cir. Jan. 31, 2019) (emphasis added); *see also Bridge*, 553 U.S. at 649 ("[A] person can be injured 'by reason of' a pattern of mail fraud even if he has not relied on any misrepresentations."); *Biggs v. Eaglewood Mortg., LLC*, 353 F. App'x 864, 867 (4th Cir. 2009) ("*Bridge*'s holding eliminates the requirement that a plaintiff prove reliance in order to prove a violation of RICO predicated on mail fraud.").[3]

To "defraud," of course, "has the common understanding of wronging one in his property rights by dishonest methods or schemes and usually signify[ing] the deprivation of something of

[3] The Supreme Court has made clear that under the mail and wire fraud statutes, a plaintiff is not required to prove that: (1) the wrongdoer succeeded in deceiving or defrauding the intended victim; (2) the victim suffered any loss of money, property, or other harm; or (3) the intended victim detrimentally relied upon the wrongdoer's fraudulent misconduct. *See Neder v. United States*, 527 U.S. 1, 24–25 (1999) ("The common-law requirements of 'justifiable reliance' and 'damages,' for example, plainly have no place in the federal fraud statutes.").

value by trick, deceit, chicane, or overreaching." *Wynn*, 684 F.3d at 477-78 (internal quotation marks omitted) (citing *Carpenter v. United States*, 484 U.S. 19, 27 (1987)). The Fourth Circuit recognizes that "the federal fraud statutes should be 'interpreted broadly insofar as property rights are concerned'" and that property rights under the mail and wire fraud statutes "need not be tangible" and include "the intangible right to control the disposition of [one's] assets." *United States v. Gillion*, 704 F.3d 284, 295 (4th Cir. 2012); *see also United States v. Perez*, 528 F. App'x 319, 323 (4th Cir. 2013) ("[F]raud encompasses deceptive acts which deprive others of 'the intangible right to control the disposition of [their] assets.'") (quoting *United States v. Gray*, 405 F.3d 227, 234 (4th Cir. 2005)). This "right to control" encompasses the student-athletes' right to control their valuable NCAA eligibility and their decision on which school (and, therefore, which athletic apparel company) should benefit from their names, images, and likenesses.[4] *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d, 955, 966 (N.D. Cal. 2014); *see also Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 684 S.E.2d 756, 760 (S.C. 2009) ("We further hold the right to control the use of one's identity is a property right that is transferable, assignable, and survives the death of the named individual."). It likewise encompasses the universities' right to control their limited athletic-based scholarship funds.

The Court's August 8, 2019 order granting Plaintiff leave to amend his complaint identified five circumstances in which it found the original complaint lacked sufficient particularity to establish wire fraud. (ECF No. 82 at 6-7). Plaintiff amended his complaint to expressly articulate Defendants' racketeering conduct relied on concealment to cause the student-athlete recruits to

[4] On September 27, 2019, the State of California enacted the "Fair Pay to Play" law, which recognizes a student-athlete's financial interest in their name, image, and likeness. This law provides that universities, athletic conferences, and the NCAA "shall not prevent a student of a postsecondary educational institution participating in intercollegiate athletics from earning compensation as a result of the use of the student's name, image, or likeness." After its passage, several members of the South Carolina legislature announced similar legislation will be introduced later this year.

"unwittingly and falsely" certify their NCAA eligibility, to cause the universities to make full scholarship offers to the recruits, and, in turn, to cause the student-athlete recruits to accept those offers binding them to the Adidas-sponsored teams. (*See, e.g.*, Am. Compl. ¶¶ 137-139.) First, the amended complaint alleges that Defendants intended to defraud Plaintiff, Dennis Smith, Jr., Billy Preston, and Silvio DeSousa of, among other things, their NCAA eligibility and right to control it, their property interest in their athletic contracts with the universities, the right to control their names, images, and likenesses, and the benefits they were to have received as eligible student-athletes on their teams, such as training, nutrition, and other professional development necessary to prepare for careers in the NBA. (*See* ¶ 137; *see also* ¶ 121 ("student-athletes possess three key assets that Adidas and its co-conspirators sough to procure: (1) the players' amateur athletic services/eligibility; (2) the legal agreement that every top player signs with their Division I university binding that player to the team (and, therefore, the team's apparel sponsor); and (3) the player's image and likeness"); ¶ 122 ("a student-athlete's athletic services/eligibility, collegiate contract, and image and likeness represent real value to top players"); ¶ 125 ("Adidas . . . defrauded the targeted players of their right to control which university and, therefore, which apparel sponsor would benefit from their image and likeness"); ¶ 131 ("Defendants engaged in a scheme to defraud the student-athletes into falsely believing that a particular Adidas-sponsored school they were steered toward was the best basketball fit for them and their professional careers over all others when, in fact, committing to those schools would result in their ineligibility to participate in sports under NCAA rules"); ¶¶ 132-33 (Defendants "intended" that Brian and "the other student-athlete recruits targeted in their scheme remain unaware of the bribe payments and their fraudulent scheme so they too would play for Adidas-sponsored teams."); ¶¶ 143-48 (scheme to defraud Smith Jr.); ¶¶ 153-54 (scheme to defraud Preston); ¶¶ 155-164 (describing scheme to defraud DeSousa); ¶¶

166-232 (scheme to defraud Brian); ¶ 174 ("Defendants had targeted [Brian] for their bribery scheme in an effort to obtain his amateur athletics services/eligibility for an Adidas-sponsored school, to make money off of his image and likeness while an amateur, and to secure him to a lucrative endorsement deal with Adidas once he entered the NBA.").)

Second, the amended complaint properly alleges that Adidas Participants (Adidas, Gatto, Code, Rivers, and Gassnola) intended to defraud each of the named universities of "the right to their honest and faithful services as representatives on their athletic interests by stripping the targeted student-athletes recruited to their teams of their NCAA eligibility to play Division I college basketball" under 18 U.S.C. § 1346. (¶¶ 134-35, 138.) This is because the NCAA bylaws classify Adidas, its employees, and agents as "representatives" of its sponsored-universities' athletic interests," (¶ 135), and because Adidas had contractual agreements with each of the universities. (*E.g.*, Ex. 1 (sponsorship agreement between Adidas and Louisville).) The amended complaint explains that "any recruitment of a student-athlete by . . . any representative of its athletic interests in violation of [NCAA rules] shall result in the student-athlete becoming ineligible." (¶ 135 (describing rules violations under NCAA bylaws §13.01.1, § 13.2.1, §16.01.1, and §16.02.3); *see also* ¶ 31.) The amended complaint clearly alleges how Adidas and its employees and agents, including Gatto, Rivers, Code, and Gassnola, each acted against the interests of the Adidas-sponsored universities by actively recruiting players to teams through bribery in violation of NCAA rules. (*See, e.g.* ¶¶ 154(d), (e) and Ex. 8, 163, 217-219 (describing Gatto's knowledge and approval of bribe payments used to recruit players); ¶¶ 110-111 (describing Rivers's knowledge and concealment of bribery scheme); ¶¶ 147, 154, 163 (describing Gassnola's recruitment of players through bribes); ¶¶ 154(h)-(k) and Ex. 12 (alleging that Adidas's Director of Finance approved a $90,000 payment to Gassnola for "1st Quarter 2017" travel and consulting

fees just six days after signing Gassnola to an agreement limiting his maximum *annual* payment to $70,000. $20,000 of that money was funneled to Billy Preston's mother.)

Third, the amended complaint alleges that all Defendants defrauded the universities into providing "athletic-based scholarships and financial aid under false and fraudulent pretenses," thereby interfering with the universities' right to control their assets, including decision-making about the distribution of their limited athletic scholarships. (¶¶ 134-35; 139; Ex. 2.) This third scheme to defraud is the same fraudulent scheme Gatto, Code, Dawkins, Sood, and Gassnola were convicted of engaging in and, as with the other schemes to defraud described in the complaint, is based on the same set of facts and evidence. *See United States v. Gatto*, 295 F. Supp. 3d 336, 348 (S.D.N.Y. 2018) ("Here, the alleged misrepresentations and omissions, *i.e.* the concealment of the NCAA rules violations, allegedly were made in order to obtain athletic scholarships for certain prospective basketball players and to deprive the universities of their right to control their assets. Defendants do not dispute, nor could they, that both athletic scholarships and the right to control one's assets constitute 'money or property' for purposes of the wire fraud statute."). Compliance officials from N.C. State, the University of Kansas, and the University of Louisville testified at the *Gatto* trial that none of their universities would have awarded athletic scholarships to the student-athletes victims had the universities been aware of the bribery scheme. (*See* ¶¶ 148, 164, 223.)

Lest there be any doubt that each Defendant possessed the specific intent to defraud the student-athlete recruits and universities, the amended complaint makes specific allegations establishing each Defendant's conscious and purposeful engagement in the bribery schemes and efforts to conceal their conduct.[5] (*See, e.g.*, ¶ 105 (Gatto's acknowledgement of bribery schemes

[5] While there is extraordinary direct evidence of Defendants' intent alleged in the amended complaint, intent to defraud under the federal wire fraud statute may inferred from the totality of the circumstances and can be proven by indirect and circumstantial evidence. *See, e.g.*, *United States v. Strothman*, 892 F.2d 1042 (4th Cir. 1989).

during opening statements in his criminal trial: "If a basketball coach went to Jim [Gatto] and told him that he really wanted a particular kid on that team and he asked Jim to make that happen, . . . Jim understood that to mean that Adidas should help the kid's family out financially"); ¶ 110-11 (Rivers instructing Adidas personnel to exclude overt references to the bribe payments in emails); ¶ 123 (Code's admission in his sentencing memorandum that he "understood he was violating NCAA's rules"); *id.* (Gassnola's admission at his plea hearing: "At the time I did this, I knew this was illegal, and I took steps the steps to conceal this."); *id.* (Sood's admissions at his plea hearing: "I believed that . . . receipt of those payments by the players and/or their families could make the players ineligible"); *id.* (Adidas's motion for an injunction against the NCAA in which it acknowledges the importance of NCAA bylaws governing matters "such as a student's eligibility"); Ex. 1. at 13 (Adidas's reserving the right to terminate its sponsorship of Louisville if it is sanctioned by the NCAA for major rules violations); ¶ 211 and Ex. 32 (Code and Sood discussing making a bribe payment in cash "for cleanliness and lack of questions" and how Adidas disguises bribe payments as contributions to 501(c)(3) organizations); ¶ 215(b) (Sood scolding undercover FBI agent for communicating via text message about bribe payment); ¶ 217 (Adidas, Code, Dawkins, and Gatto accounting for Adidas bribe payments as payments to AAU teams "so it's on the books, [but] it's not on the books for what it's actually for"); ¶ 222 (Dawkins explaining to undercover FBI agents that "some of the money can't be completely accounted for on paper because some of it is, whatever you want to call it, illegal.").

B. Defendants Concealed Material Information from the Student-Athletes and Universities

A central component of Defendants' schemes to defraud was the concealing and withholding of material information regarding their bribery scheme from Brian, the other student-athlete victims, and the universities providing athletic-related financial aid to them. (*See, e.g.*, ¶¶

229-230). When a claim for fraud rests on concealment of material information, the heightened pleading requirement under Rule 9(b) is necessarily relaxed "because an omission cannot be described in terms of the time, place, and contents of the misrepresentation or the identity of the person making the misrepresentation." *Shaw*, 973 F. Supp. at 552 (citation omitted); *see also Belville v. Ford Motor Co.*, 60 F. Supp. 3d 690, 697 (S.D.W. Va. 2014) ("[A] more relaxed standard under Rule 9(b) should apply in omission cases because a plaintiff cannot be required to specifically identify the precise time, place, and content of an event that did not occur.").

Nevertheless, the amended complaint alleges substantial detail regarding Defendants' concealment of their fraud scheme from the student-athlete recruits and the universities.[6] First, the amended complaint alleges that Defendants executed their schemes, in part, by "leverage[ing] pre-existing relationships forged between the high school players' families and their AAU coaches and others whom those families trusted," such as Dawkins and Gassnola, so that the student-athletes would be lulled into "falsely believing that a particular Adidas-sponsored school they were steered toward was the best basketball fit for them and their professional careers over all others when, in fact, committing to those schools would result in their ineligibility to participate in sports under NCAA rules." (¶¶ 131-33.) This "lulling" of the victims was important to defrauding the student-athletes of their eligibility and other rights, as success depended on the credibility of the individuals close to the student-athletes and their ability to persuade the students to play for the

[6] While "[c]oncealment often is accompanied by an affirmative misrepresentation or a violation of an independent statutory or fiduciary disclosure duty, [] neither is 'essential' for actionable fraud." *United States v. Colton*, 231 F.3d 890, 901 (4th Cir. 2000); *see also United States v. Coyle*, 943 F.2d 424 (4th Cir.1991) (rejecting argument that nondisclosure absent an independent duty to disclose cannot constitute fraud); *United States v. Keplinger*, 776 F.2d 678, 697 (7th Cir. 1985) ("It requires no extended discussion of authority to demonstrate that omissions or concealment of material information can constitute fraud, or concealment of material information can constitute fraud cognizable under the mail fraud statute, without proof of a duty to disclose the information pursuant to a specific statute or regulation."). Rather, "[w]hat is essential is proof of a 'scheme or artifice to defraud,' which can be shown by deceptive acts or contrivances intended to hide information, mislead, avoid suspicion, or avert further inquiry into a material matter." *Colton*, 231 F.3d at 901. The amended complaint alleges ample deceptive acts by each defendant to conceal their bribery scheme from the student-athletes and universities.

school chosen by Adidas under false pretenses (i.e., persuading the student-athlete that a particular team was the best basketball fit for them) and to avoid arousing suspicion among the athletes, who would be required to certify their NCAA eligibility as part of the signing process. *See United States v. Bradshaw*, 282 F. App'x 264, 267 (4th Cir. 2008) ("A mailing is considered to be 'for the purpose of executing' a fraudulent scheme if it is 'designed to lull the victims into a false sense of security,' even if it is 'incident to an essential part of the scheme.'") (citation omitted).

Second, Defendants worked to conceal the bribery scheme from the Adidas-sponsored universities so those schools would offer athletic scholarships and athletic-related benefits to the targeted recruits, as well as submit certifications of their eligibility to the NCAA. (¶¶ 138-39; *see also* ¶¶ 163(h); 185-86, 188, 190, 200, 223, 229, 230, and Ex. 42.) Adidas was under a contractual obligation to deal with each of them in good faith, both as a matter of law and as a representative of their athletic interests. (¶ 135; Ex. 1); *see also Gresh v. Waste Servs. of Am., Inc.*, 738 F. Supp. 2d 702, 710 (E.D. Ky. 2010) ("[U]nder Kentucky law, parties have a duty in carrying out a contract to act in good faith, sincerely and without deceit or fraud."). While the complaint alleges certain Division I basketball coaches had knowledge of the bribery schemes, Plaintiff specifically alleges that "none were authorized by their respective universities" to engage in it. (¶ 108(c).)[7] As discussed above, compliance officials testified in the *Gatto* trial that their programs would not have awarded scholarships had they been aware of the bribery scheme. (¶¶ 148, 164, and 223.)

[7] *See United States v. Gatto*, 295 F. Supp. 3d 336, 342–43 (S.D.N.Y. 2018) ("[A] jury would be entitled to infer that the coaches were not acting solely in the interests of their employers . . . [and] that the coaches had substantial personal interests—financial, reputational, career, and competitive interests—in fielding the most successful teams possible and that those interests were not entirely aligned with the interests of their employers. In other words, it is quite possible that the coaches' motives were either entirely selfish or mixed—combining desires to 'help' their schools by fielding winning basketball teams with actions contrary to their schools' interests because they violated the school's policies and subjected the schools to a risk of severe penalties that the schools would not have run had they known all of the facts.").

In the scheme to defraud Brian, Defendants purposely worked through Dawkins, "who had known Brian and his father for years and whom Brian trusted." (¶ 131, 179.) By working through Dawkins, the other Defendants were able to secure Brian's commitment to the University of Louisville. And since each Defendant had a role in furthering the scheme to get Brian to attend the University of Louisville, it matters not that Dawkins was the only member of the Enterprise who had direct contact with him. *See* 18 U.S.C. § 1962(c) (extending RICO liability to anyone who participates "directly or indirectly" in the conduct of an enterprise's affairs); *United States v. Boyle*, 556 U.S. 938, 948 (2009) ("Members of [an association-in-fact enterprise] need not have fixed roles; different members may perform different roles at different times."); *United States v. Fowler*, 535 F.3d 408, 418 (6th Cir. 2008) (holding that participation "can be accomplished either by making decisions on behalf of the enterprise or by knowingly carrying them out").[8]

Throughout the 2017 basketball recruiting period, Dawkins had ingratiated himself with Brian and offered to be his sounding board and advisor on his college basketball decision. (*See* ¶ 179 (May 23, 2017 text from Dawkins to Brian: "Let me know if u have any questions or want to know anything background wise about the coaches or players before u make a final decision …whatever u do u will kill it!!") What Brian did not know, and what Dawkins never told him, was that just a day prior Code texted Dawkins with the order: "Don't send Bowen to Oregon!!! Call me." (¶ 177 and Ex. 21.) In the days that followed, both Dawkins and Gatto contacted UofL's Coach Rick Pitino and offered him an opportunity to recruit Brian. On May 23, 2017, Dawkins texted Pitino: "Would you have any interest in Brian Bowen or are you done recruiting?" (¶ 180.)

[8] Liability for RICO conspiracy under § 1962(d), as alleged in Count II of the amended complaint, requires even less direct involvement between the perpetrators and the victim. "[S]imply agreeing to advance a RICO undertaking is sufficient" to establish liability. *United States v. Mouzone*, 687 F.3d 207, 218 (4th Cir. 2012). Such "agreement" can be manifested "by either words or action." *United States v. Tillett*, 763 F.2d 628, 632 (4th Cir. 1985).

On May 27, 2017, Gatto telephone Pitino and left him a message to return the call and speak "about a player I want to discuss with you." (¶ 182 and Ex. 22.) Minutes later, Pitino returned the call. (*Id.*) Gatto and Dawkins made no mention of the bribe scheme in their communications with Pitino, or in Gatto's call days later to congratulate him on signing Brian. (¶ 196 and Ex. 26.)

When Brian and his family visited Louisville's campus, Dawkins accompanied them but did not inform Brian or Louisville officials that he was there on behalf of the Adidas Bribery Enterprise. (¶¶ 183-86.) Indeed, Dawkins was listed on UofL's visit record as Brian's "AAU coach" and in UofL's recruiting program as Brian's "friend." (¶ 186 and Ex. 23.) During the visit, Brian was told by Louisville's athletic department officials that he was eligible to play NCAA Division I basketball and was offered a full athletic scholarship on the spot. (¶ 188.) Dawkins was present, was aware of UofL's eligibility determination and the scholarship offer, but remained silent about the bribery scheme. (*Id.*; *see also* ¶ 190.) Instead, Dawkins recommended to Brian that "UofL was a good basketball fit and the right place for him to commit his amateur athletic services." (¶ 188.) Dawkins then exerted pressure on Brian's mother to get him to commit to UofL that evening. In his texts to her, Dawkins made affirmative misrepresentations and omissions about the existence of the bribe scheme, (¶ 194 ("I don't think he should make a decision based on a shoe company. None of them are paying him. That part isn't the reason u pick")) and created a false sense of urgency to pressure her to get Brian to commit that evening (*id.* ("They just need to get the class enrollment done. That's why they are pressing. It's their academic people on their case.")). Brian signed with UofL hours later. (¶ 195.) On June 1, 2017, Brian signed a student-athlete aid agreement, which included a certification of his amateur status and eligibility. (¶ 197 and Ex. 27.) On June 7, 2017, Brian signed a Student-Athlete Statement Concerning Eligibility attesting to his amateur status and NCAA eligibility. (¶ 199 and Ex. 28.) Relying on

these certifications from Brian and having no knowledge of the bribe scheme, Louisville submitted its own "certification of eligibility" to the NCAA in August 2017. (Ex. 42.)

Defendants' concealment of the bribery scheme from Brian and the other student-athletes was critical to its success. As industry professionals, Defendants knew each student-athlete recruit was required by the universities to certify their amateur status and NCAA eligibility as a condition of joining the teams and as a condition for receiving athletic-related financial aid. (*See* ¶ 193(d) (Code and Dawkins discussing "scholarship papers" and national letter of intent (NLI)). Defendants knew these certifications of amateur status and eligibility were required for the bribery scheme to work, as the universities would not have awarded scholarships without them.[9] (*See, e.g.*, Ex. 10 at 2 ("I understand that to qualify for this athletic aid, I **must**: meet and maintain the eligibility requirements for athletic participation and financial aid establish by the [NCAA]").) And the targeted student-athletes would not knowingly jeopardize their college and professional careers to effect a bribe they had no part of—particularly top recruits like Brian who had no trouble attracting dozens of legitimate, four-year scholarship offers from other top programs. (¶ 168.)

C. Defendants' Wire Transmissions in Furtherance of the Fraudulent Schemes

In manifesting their schemes to defraud, Defendants engaged in a wide range of wire communications and transmission, including telephone calls, text messages, and bank wire and ACH transfers—many of which are identified above. To resolve any doubt about the "who, what, when, where, and how" of these allegations, Plaintiff attached over fifty exhibits to his amended complaint, including authenticated copies of transcripts from wiretapped calls, text messages,

[9] The amended complaint lists the dates each eligibility certification was made and provides copies of those certifications. (*See* ¶¶ 147(g),(h), ¶ 148 and Ex. 6-7 (Smith's certifications to NC State dated Nov. 11, 2015 and Dec. 17, 2015); ¶ 154(g) and Ex. 10 (Billy Preston's certifications to Kansas dated Nov. 9, 2016); ¶ 163(j) and Ex. 18 (Silvio DeSousa's certifications to Kansas dated Nov. 8 and 13, 2017); ¶¶ 197, 199-200, 230 and Exs. 27 and 28 (Brian Bowen's athletic tender agreement dated June 1, 2017 and NCAA statement concerning eligibility dated June 7, 2017).

sham invoices and related payment approvals, and wire transfers and bank statements, and pleaded the specifics of these communications and transmissions. On the weight of this substantial *evidence*, Defendants have no credible basis to argue that the amended complaint fails to allege the required specificity regarding their use of the wires to further their fraudulent scheme. Set forth below are exemplar uses of the wires by each Defendant in the various schemes:

Adidas – ¶¶ 154(*i*), 205, 226; Ex. 9 ($50,000 bank transfer from Adidas America to New England Playaz account); Ex. 13 ($90,000 bank transfer from Adidas America to New England Playaz account); Ex. 16 ($70,000 bank transfer from Adidas America to New England Playaz); Ex. 39 at 18 ($25,000 bank transfer from Adidas America to Karolina Khaos); Exhs. 52 and 53 (summary charts listing Adidas wire payments to Gassnola and corresponding payment approvals, including approvals by Zion Armstrong (then co-head of Adidas America and currently its President) and Chris McGuire (Adidas America's Head of Sports Marketing); Ex. 54 ($75,000 invoice from Code for "consulting fee" and "travel expenses" indicating payment approval by Adidas's Zion Armstrong and Chris McGuire two weeks after Brian committed to UofL).

Gatto – ¶¶ 147(f), 154(d),(i),(m), 163(g), 165, 182, 192-93, 205-06, 218, 224-25; Exhs. 5, 8, 12, 15, 30, 36-38, 45, 46 at 3, 49 (all showing Gatto's approval of various sham invoices); Ex. 19 (Aug. 11, 2016 wiretapped call discussing scheme to defraud Miami); Ex. 26 ("lulling" voicemail to Pitino); Ex. 43 (wiretapped call with Code discussing UofL bribe payments); Ex. 51 (email discussing Code's sham invoices).

Code – ¶¶ 165, 176-78, 191-93, 203-05, 207, 209-11; Exhs. 19, 20, 21, 29, 31-32,43-44, 47-48, and 50.

Dawkins – ¶¶ 165(a), 175, 179-81,191-95, 215, 217, 222; Ex. 33 (text messages with Sood discussing bribe payment); Ex. 35 (wiretapped call with Sood discussing bribe payment).

Gassnola – ¶¶ 147(f), 154, 162, 163(g), 192; Ex. 14 and 17 (wire transfers to Preston's mother); Ex. 26 (text messages with Code regarding UofL scheme).

Sood – ¶¶ 211, 213-15, 221; Ex. 32 (wiretapped call with Code and undercover FBI agent discussing UofL scheme); Ex. 33 (text messages with Dawkins discussing bribe payment); Ex. 35 (wiretapped call with Dawkins discussing bribe payment); Ex. 41 (check deposit from Sood's company's account).

Rivers – ¶¶ 110-11 (Rivers Feb. 17, 2015 email instructing Adidas personnel to exclude overt references to the bribe payments in emails); ¶ 176 and Ex. 20 (Rivers receipt of May 18, 2017 email including paperwork necessary to establish the Karolina Khaos as a payee in Adidas's accounting system). The amended complaint adds new allegations regarding Rivers's involvement in the fraud schemes, including his travel to North Carolina to meet with Dennis Smith, Jr's father and trainer (¶ 144), Gatto and Code's coordination with him on the schemes to defraud the University of Miami (¶ 165(c),(d) and Ex. 19) and on the scheme to defraud Brian (¶ 176.).

Defendants Rivers submitted a separate motion to dismiss the amended complaint challenging the sufficiency of the allegations of wire fraud against him. (ECF No. 97.) In it, he asserts that Brian did not adequately plead his involvement in two predicate acts of racketeering, although he concedes the Court did not dismiss the money laundering predicate act against him. Rivers also asserts that his alleged role in the Adidas Bribery Enterprise did not cause any harm to Brian.[10] As set forth above, however, the schemes to defraud Brian, the other student-athletes, and the universities were manifested through concealment and material omissions regarding the bribe

[10] For example, Rivers states that his role in "the allegations regarding Dennis Smith, Jr. from January 2015 have nothing to do with *Plaintiff's* decision to enroll at Louisville *two and a half years later*." (ECF No. 97-1 at 3.) This argument, however, confuses the "pattern" element of § 1962(c) with causation. *See Marshall & Ilsley Tr. Co.*, 819 F.2d at 809-10 ("It would be illogical to require a plaintiff to show that all the acts adding up to a 'pattern' injured him, especially in view of the fact that many such acts may be somewhat distinct and separate in time.").

payments. The amended complaint makes clear the importance of Rivers's role in all of it; namely, his email directive that no one memorialize in writing any efforts to bribe families of players, (¶¶ 110-11), and his coordination to set up the AAU team through which sham invoices would be used to transfer bribe money so it remained untraceable to Adidas in the scheme to defraud Brian of his eligibility. (¶ 176 and Ex. 20.) Thus, Rivers cannot credibly deny his alleged role in facilitating the bribery scheme. All he can do is contest the allegations under Rule 9(b). But, as here, when fraudulent schemes are manifested through concealment—which is exactly what Rivers ordered in his February 17, 2015 email directive—the heightened pleading standard is necessarily relaxed. *See Bd. of Managers of Trump Tower*, 346 F. Supp. 3d at 460–61 ("In complex civil RICO actions involving multiple defendants . . . Rule 9(b) requires only that the plaintiff delineate, with adequate particularity in the body of the complaint, the specific circumstances constituting the overall fraudulent scheme."). With respect to the wire fraud allegations, "[p]laintiff need only allege that each defendant 'directly participated in the scheme and could reasonably foresee that the mails would be used in furtherance of the same.'" *Id.* Indeed, Rivers reasonably foresaw that emails would be used in furtherance of Defendants' fraudulent schemes, which is why he sought unsuccessfully to curtail their use. That a third-party used email to communicate with Rivers—namely, to send him the paperwork necessary to set up the Karolina Khaos in Adidas's billing system, (Ex. 20)—does not provide any safe harbor with respect to wire fraud. *United States v. Amico*, 486 F.3d 764, 781 (2d Cir. 2007) ("To prove that a defendant caused a mailing, it is sufficient to prove that he could have reasonably foreseen that the mailing would take place."); *Bd. of Managers of Trump Tower*, 346 F. Supp. 3d at 461 ("[T]he fact that a third party may have caused the use of the mails does not render the pleading defective, so long as the defendants could reasonably have foreseen that the third-party would use the mails in the ordinary course of business

as a result of defendants' act.") (quoting *SKS Constructors, Inc. v. Drinkwine*, 458 F. Supp. 2d 68, 76 (E.D.N.Y. 2006)).

At bottom, the amended complaint properly alleges (1) that Rivers was part of the Adidas Bribery Enterprise, (2) that he engaged in multiple predicate acts of wire fraud and money laundering, and (3) that his coordination in setting up the front through which bribe money used to defraud Brian was funneled out of Adidas establishes his role in causing Brian's injuries.

II. THE AMENDED COMPLAINT PROPERLY ALLEGES PREDICATE ACTS OF MONEY LAUNDERING

In seeking to challenge the existence of a "pattern of racketeering activity" required under § 1962(c), Defendants assert that the amended complaint fails to plead money laundering because the "specified unlawful activity" underlying money laundering offenses—here, wire fraud under 18 U.S.C. § 1943—is inadequately pleaded with particularity. By the very nature of Defendants' argument, it is contingent entirely on the Court concluding that every allegation of wire fraud in the amended complaint is inadequately pled. Thus, should the Court conclude that Plaintiff has adequately established any instances of wire fraud (which are amply described herein), Defendants' basis for dismissing the money laundering allegations evaporates.

Setting aside the contingent nature of Defendants' argument, the Court need not address it at all. Defendants previously raised several challenges to Plaintiff's money laundering allegations in three of the motions to dismiss his original complaint they filed and/or collectively joined. (*See, e.g.*, ECF No. 29-1 at 21 (Adidas arguing for dismissal of money laundering allegations); ECF No. 30-1 at 11-12 (Rivers arguing for dismissal of money laundering allegations); and ECF No. 33-1 at 5-6 (Gatto arguing for dismissal of money laundering allegations).) After this substantial briefing (supplemented by further argument in their reply briefs) and ample oral argument on the issue at the June 26, 2019 hearing on their motions, the Court concluded that "Plaintiff has pled

sufficient factual material to allege plausible claims to relief" with respect to his money laundering allegations. (ECF No. 82 at 8.) Yet, despite the clear and unambiguous language in the Court's August 8, 2019 order that "Defendants' Motions are denied as to all remaining arguments," (*id.* at 9), Adidas seeks to push it aside by remarkably asserting in its motion that "the Court did not rule on the sufficiency of the money laundering allegations." (ECF No. 94-1 at 7.)[11] Apparently undeterred by this Court's prior decision, Defendants plow ahead with their ***fourth attempt*** to dismiss the money laundering allegations.[12]

In light of the less than forthright presentation of the procedural history of Defendants' money laundering argument, the Court need not entertain it. *See Evans*, 148 F. Supp. at 544 ("[T]he court should not reevaluate the basis upon which it made a prior ruling, if the moving party merely seeks to reargue a previous claim."). Moreover, the fact that Brian filed an amended pleading does not reopen consideration of arguments previously raised by Defendants and rejected by the Court. *See Rowley*, 502 F.2d at 1333 (4th Cir. 1974); *Maxtena, Inc. v. Marks*, No. DKC 11-0945, 2012 WL 113386, at *11 (D. Md. Jan. 12, 2012); *see also* 2A Moore's Federal Practice § 12.22 ("Amendment of the complaint ... does not revive the right to interpose defenses or objections which might have been made to the original complaint.").

Yet, even if the Court were to consider Defendants' latest effort to dismiss the money laundering allegations, it remains a dead letter argument. First, as set forth above in Section I, Plaintiff alleged a substantial number of instances of wire fraud engaged in by Defendants, any

[11] Defendant Rivers accurately acknowledges in his motion that the Court's Order "denied the remaining arguments in Defendants' motions, which included Defendants' arguments that Plaintiff failed to adequately plead that Defendants committed money laundering as a predicate act of racketeering" and that Plaintiff's money laundering allegations "survived Defendants' motions to dismiss." (ECF 97-1 at 2.)

[12] Adidas takes the same cavalier approach elsewhere in its motion when asserting that it is not directly or vicariously liable for the racketeering alleged against it—*i.e.*, re-raising grounds for relief that the Court previously denied without so much as acknowledging the Court's prior ruling on the argument. (Adidas Mot. at 13-17.)

number of which are sufficient to serve as the "specified unlawful activity" to support multiple instances of money laundering in the years Defendants engaged in their bribery scheme. Second, because the unit of prosecution in money laundering cases is each individual financial transaction, and not the money laundering scheme itself, Defendants' argument fails because they have not explained *why* each of the individual financial transactions alleged in the amended complaint fail to amount to separate predicate acts of money laundering. Indeed, Plaintiff's money laundering allegations are well-grounded in the evidence adduced during the *Gatto* trial. Moreover, Defendants Gatto, Sood, Code, and Dawkins were each charged with money laundering conspiracy under 18 U.S.C. § 1957(h) in the original criminal complaint unsealed against them. (*See* ¶¶ 91-94 and Ex. 2.)

Finally, Defendant Gatto's argument that "Plaintiff's allegations of money laundering are predicated on tax fraud [and] tax fraud is not a 'specified unlawful activity,'" misses the mark. (*See* ECF No. 95-1 at 3.) The federal money laundering statute specifically prohibits money laundering of proceeds from specified unlawful activity when done "with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986." 18 U.S.C. § 1956(a)(1)(A)(ii). Plaintiff did not plead "tax fraud" as the specified unlawful activity for money laundering and does not contend that it is; rather, his allegations of tax fraud in the complaint relate specifically to Adidas's practice of funneling bribe money through 501(c)(3) tax exempt organizations in order to create an impermissible tax benefit. (*See* ¶ 211(e) (quoting Ex. 32 at 9-10); *see also* ¶¶ 267, 268 ("[W]hen Adidas launders bribe money through the AAU teams and assigns a corresponding budget expense code to those funds as payments made to 501(c) charitable organizations, an improper tax benefit is created, resulting in inflated earnings and a material understatement of the company's tax expense."); 269-70.)

III. THE AMENDED COMPLAINT ALLEGES COGNIZABLE INJURIES TO PLAINTIFF'S BUSINESS AND PROPERTY INTERESTS

The Court has already received extensive argument on the issues of standing and injuries to Brian's business and property interests in the several rounds of briefing on Defendants' first motions to dismiss and at the June 26, 2019 hearing. The amended complaint, like the original, alleges cognizable injuries to Brian's business and property interests as a direct result of Defendants' racketeering activities. (¶ 282.) Accordingly, Plaintiff restates his arguments briefly below and craves reference to the full arguments made in opposition to Defendants' original motions to dismiss, (ECF No. 55 at 9-22), at the hearing, and in his opposition to Defendants' motion for leave to file a surreply (ECF No. 80.)

To have standing under § 1964, a RICO plaintiff must plausibly allege injury to "his business or property." 18 U.S.C. § 1964(c). Whether a property interest falls within the ambit of § 1962(c)'s "injury to business or property" is ultimately a matter of state law. *See Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972); *see also Indiana ex rel. Carter v. Pastrick*, 384 F. Supp. 2d 1261, 1266 (N.D. Ind. 2005). Property interests under the law are broad and include lost profits. *See In re Am. Honda Motor Co., Inc. Dealerships Relations Litig.*, 941 F. Supp. 528, 540–41 (D. Md. 1996) ("Lost profits are remediable in RICO"); *Mid Atlantic Telecom, Inc. v. Long Distance Svcs., Inc.*, 18 F.3d 260 (4th Cir. 1994) ("lost revenues and customers" are sufficient injuries to establish RICO standing). While Defendants attempt to minimize the extent of Brian's injuries, the amended complaint alleges thirteen categories of business and property injuries directly arising from Defendant's racketeering acts, including his loss of NCAA eligibility, interference with his student-athlete agreement, loss of athletic-related benefits as an eligible athlete at UofL, financial costs incurred to continue his basketball career after leaving Louisville, and legal fees both from the government's investigation of Defendants and from this action.

NCAA Eligibility – Brian's NCAA eligibility was a valuable business interest, as the NCAA is the proving ground for the NBA. (¶¶ 7-9.) Elite players like Brian are not permitted to join the NBA until they are one year removed from high school and, unlike other professional sports, no player may contract with an NBA team unless they have first participated in the NBA draft.[13] Therefore, where to play basketball after high school and prior to the NBA draft and when to forego eligibility and enter the draft are critical business decisions for an athlete preparing for an NBA career. (¶¶ 10, 137.) That is why top college recruits choose the most competitive basketball schools where they can receive the best pre-professional development and gain national exposure and experience playing against other top athletes. (*See, e.g.*, ¶¶ 129-30, 215(a).) Eligibility is a bargained-for benefit under NCAA rules. (¶¶ 29-39.) Like all student athletes, Brian had to register with the NCAA and undergo an extensive certification process prior to gaining eligibility status. (ECF 56-9 at 7.) The NCAA certified his eligibility before he applied to college and he used that status to gain entry to UofL, and his status was again confirmed before the start of the 2017 season. (¶¶ 198, 223 and Ex. 42.) Brian's interest in his NCAA eligibility is no different than recognized property interests in similar benefits. *See Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (recognizing a property interest exists "if there are such rules or mutually explicit understandings that support [the holder's] claim of entitlement to the benefit"); *Roth*, 408 U.S. at 577 (property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source"); *Richardson v. Town of Eastover*, 922 F.2d 1152, 1157 (4th Cir. 1991) ("[M]utual expectations may create an entitlement in a license."); *see*

[13] *See* NBA-NBPA COLLECTIVE BARGAINING AGREEMENT JAN. 19, 2017, Article X: Player Eligibility and NBA Draft, at 273 (Jan. 19, 2017) *available at* https://nbpa.com/cba (last visited Oct. 18, 2019).

also Brown v. South Carolina State Bd. of Educ., 391 S.E.2d 866, 867 (S.C. 1990) (recognizing property interest in teaching certificate necessary for employment).

Athletic-Tender Agreement – Brian's athletic-tender agreement with UofL was another business and property interest harmed by Defendants. (Ex. 27; *see also* ¶¶ 197, 282.) In exchange for committing his NCAA eligibility to Louisville, Brian received a four-year athletic scholarship, a position on of the UofL basketball team, and the athletic-related benefits that UofL provided him as an eligible student-athlete. Defendants assert the latter benefits are "amorphous" and that Brian "had no contractual rights to those benefits," (Adidas Mot. at 22), but the amended complaint quite plainly describes these tangible benefits as arising under the athletic-tender agreement and having clear value in the marketplace: professional strength and conditioning, sports nutritionists, trainers, elite coaching, and the ability to practice and develop skills alongside other elite players.[14] (¶¶ 8-9, 118, 187). Moreover, Brian's access to them did not depend on whether he was to sit or start any given game; rather, they were part and parcel of his being an eligible student-athlete at UofL.[15] Once he lost that eligibility (when Defendants paid the bribe money and rendered him ineligible under NCAA bylaws and also by operation of the bylaws when UofL learned of the scheme, *see* NCAA bylaw § 12.11.1) Brian could no longer access those benefits. When Brian's eligibility was destroyed, he became damaged goods to UfoL and the Twitter message communicated to him that he was effectively being removed from the University.[16] That his loss of eligibility and

[14] It would be highly unlikely that UofL or any top Division I program would endorse Defendants' version of the facts—namely, that the tangible, quantifiable benefits provided to top recruits to help them develop into professional players are merely illusory promises made during the recruiting process that can be rescinded at any time.

[15] NCAA Bylaw § 17.02.1 describes many of these benefits as "Countable Athletically Related Activities." *See* NCAA DIVISION I MANUAL 2017-18 *available at www.ncaapublications.com/productdownloads/D118.pdf* (relevant bylaws excerpted in ECF No. 56-1).

[16] Indeed, the Twitter message proffered by Defendants refers only to the "student" portion of the benefits Brian received but not the "athlete" portion of the benefits that he lost. Still, it is unrealistic for Defendants to claim to devine the entirety of UofL's relationship with Brian from a single Twitter message.

benefits under the agreement directly resulted from Defendants conduct is clear—had his loss of eligibility been a discretionary decision, there would have been no legal basis for the Hon. Judge Lewis Kaplan to order Code, Dawkins, and Gatto to pay restitution to UofL (and Kansas and NC State) for scholarship money provided to ineligible student-athletes.

Defendants' absurd argument that because prosecutors did not unseal their criminal charges to the public until after Dennis Smith, Jr. was drafted in the NBA, and as a result Smith did not lose any college playing time, "proves that it was the actions of others—such as UofL and the NCAA—upon learning of the bribes that directly caused Bowen's inability to play NCAA basketball, not the bribe itself," adds no value to their defense. (Adidas Mot. at 21.) Put another way, Defendants argue that because the proverbial bullet from their gun did not squarely hit Dennis Smith, Jr. in a way that cost him his collegiate athletic career, it is impossible for Brian to have suffered any greater injury when they took their shot at him. This "no one would have gotten hurt if we hadn't been caught" defense, which undoubtedly finds its roots in the annals of *pro se* criminal defense strategy, is utterly baseless when applied to the facts alleged in the amended complaint. First, it ignores the plain-language of the NCAA bylaws governing amateurism, which clearly and automatically render a student-athlete ineligible once a violation occurs, (¶ 31), Smith Jr. included. Second, the argument "wrongly conflates legal injury with the damages arising from that injury." *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2138 (2018); *Buchanan Cty., Virginia v. Blankenship*, 496 F. Supp. 2d 715, 726 (W.D. Va. 2007) (noting in a RICO case, "[a]lthough the issue of damages is linked to proof of injury, . . . [i]njury, causation, and actual damages are distinct issues."). That Smith, Jr. was fortunate enough to ascend to the NBA after only one year at NC State (and before anyone discovered his ineligibility) does not

absolve Defendants of liability; rather, it proves the immense value of the professional development Brian lost when he was removed from the UofL basketball team his freshman year.

Additional Business and Property Interests – In addition to Brian's student-athlete agreement and NCAA eligibility, the complaint adequately alleges direct financial damages ranging from his significant loss of earnings to the various out-of-pocket costs arising from his removal from UofL's basketball team. (¶ 282.) Any one of these financial injuries is sufficient to establish standing to bring suit. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338 (1979); *see also Smith v. Allred*, No. 2:15-CV-06026, 2016 WL 3094008, at *14 (S.D. W.Va. June 1, 2016); *Spelman v. Bayer Corp.*, No. 7:10-CV-00091-JMC, 2011 WL 13312222, at *3 (D.S.C. Feb. 22, 2011).

Defendants' belief that Plaintiff's damages are merely "expectancy interests and not recoverable under civil RICO" is unfounded. (Adidas Mot. at 22.) Adidas assigned a value to Brian's Division I experience when it funded a $100,000 bribe to secure his attendance at Louisville so he would later sign an endorsement deal as an NBA player, (¶ 228); so too did Gatto, Code, Sood, Dawkins, and Gassnola in private conversations, (*e.g.*, ¶¶ 215(a)), and also during sentencing when Gatto, Code, and Dawkins argued for a reduction in the restitution owed because "the record demonstrates that [they] expected that the student athletes would each be 'one and done' players who would only receive *one* year of scholarship funds before moving on to play professionally in the NBA." (ECF No. 56-3 at 5 n.5.) In fact, during the criminal trial, Gatto sought to introduce expert testimony to establish that the "benefit" to UofL created by their fraud far outweighed its loss, concluding that UofL would have received $3,604,760 in value from Brian's being on the team had his eligibility not been destroyed. (ECF No. 56-11.) If Defendants can pin the value that Brian brought to UofL *to the dollar*, there should be no doubt that the same analysis can uncover the value *he* lost when they rendered him ineligible to play there.

Yet, even if Brian had pled no quantifiable damages (which he disputes), he still has standing because he has sufficiently pled the fact of an injury to his business or property interests. *Potomac Elec. Power Co.*, 262 F.3d at 265 ("[T]his Circuit has not held that quantifiable damages are a necessary precondition to RICO liability.").[17] So long as a RICO plaintiff has alleged a cognizable injury to his business or property stemming from a predicate act of racketeering, he has legal standing. *Id.* at 265-66. This is because the civil remedies provision of RICO provides an award of attorney's fees, *see* § 1964(c), and nominal damages in the form of fees may be awarded in the absence of proof of specific damages. *Id.* at 265.

Finally, contrary to Defendants insistence, the Court is not required to "analyze a plaintiff's standing to assert each claimed injury." (Adidas Mot. at 19.) Defendants cite no authority from this circuit for the proposition a court must curtail prospective relief before discovery has commenced. (*See* Pl's Opp'n to Leave to File Surreply, ECF No. 80 at 7-9.) So long as the complaint alleges cognizable injuries—which it does—the claims can proceed to discovery. *See Mid Atlantic Telecom*, 18 F.3d at 264 ("[P]laintiff should have the opportunity to develop support for its [RICO injury] claims through discovery."). Indeed, the discovery process is likely to uncover more facts relevant to Brian's injuries, which could potentially conflict with a premature ruling on damages that is better suited for summary judgment or trial.

IV. THE AMENDED COMPLAINT PROPERLY ALLEGES DIRECT AND VICARIOUSLY LIABILTY AGAINST ADIDAS

Despite this Court having already considered and rejected Adidas' position that Brian failed to adequately plead direct or vicarious liability against it, ECF No. 82 at 8, Adidas resurrects this same argument to challenge substantially the same allegations in the amended complaint that

[17] *See also Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 256 (1994) ("We have held that '[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim.'").

relate to the company's complicity in the racketeering activity. While the amended complaint added new detail regarding wire fraud and removed allegations of sports bribery, it did not recast responsibility for the underlying conduct. Rather, it expanded upon the allegations against Adidas, including new allegations and evidence plausibly suggesting that executives even higher up in the chain of command than Gatto and Rivers were aware of and approved the extraordinary payments to Gassnola, Code, and others that were used in the bribery scheme. Nevertheless, because an amended pleading does not create an opportunity for a responding party to seek reconsideration of a prior ruling, Adidas's dispute of liability should, again, be denied. *See Evans v. Trinity Indus., Inc.*, 148 F. Supp. 3d 542, 544 (E.D. Va. 2015) ("[T]he court should not reevaluate the basis upon which it made a prior ruling, if the moving party merely seeks to reargue a previous claim.").

Corporate liability under civil RICO is no different and no more elusive than individual liability. The RICO statute requires only that each defendant "conduct or participate, directly or indirectly, in the conduct of [the] enterprise's affairs." 18 U.S.C. § 1962(c). Adidas argues, however, that "direct corporate liability under RICO is a high bar," citing to one of the most complex civil RICO actions ever brought by the federal government—a decade-long case against nine cigarette manufacturers and two tobacco industry trade groups. (Adidas Mot. at 14 *citing United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 876-78 (D.D.C. 2006).) Adidas cites this case to suggest a higher pleading standard for corporate liability, but *Phillip Morris* made clear that RICO liability is no higher a bar against individuals than it is against corporations. *Id.* at 876 ("[A] defendant need only intentionally perform acts that are related to, and further, [the enterprise's] operation or management.")[18] Indeed, courts and juries routinely find corporate liability in far less complex RICO cases *not* cited by Defendants.

[18] The D.C. Circuit's affirmance of the tobacco-defendants' liability in *Philip Morris* reiterated this point. *See United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1112 (D.C. Cir. 2009) (per curiam).

Adidas also incorrectly suggests that it cannot be liable for racketeering because the underlying criminal conduct was "not within the scope of the authority provided by adidas to any of its employees or agents." (Adidas Mot. at 17.) If true, virtually no corporation could be held liable for the predicate acts of racketeering listed in § 1961(1) and engaged in by its personnel, as no state authorizes its licensed businesses to engage in criminal activity. Again, Adidas ignores the large weight of authority undermining its positions; namely, that when individual employees use a corporation to conduct a pattern of racketeering activity, the corporation can be held liable as a culpable "person" under § 1962(c). *See, e.g.*, *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 164-65 (2001); *Oki Semiconductor Co. v. Wells Fargo Bank, Nat. Ass'n*, 298 F.3d 768, 776 (9th Cir. 2002) ("[R]espondeat superior liability for an employee's RICO violations encourages employers to monitor closely the activities of their employees to ensure that those employees are not engaged in racketeering.").

The amended complaint plainly and plausibly alleges that Gatto (himself a senior Adidas executive) and Code were each acting within the scope of their employment with Adidas when engaging in the bribery scheme, (¶¶ 16,17), that Adidas funded and benefited from it (¶¶ 109(a), 238, 268-70), and that top executives knew of or otherwise were "recklessly indifferent" to the plainly inflated invoices used for bribe payments, (¶¶ 154, 260-61; 265-66 and Exhs. 11-12, 15). Gatto admitted in his Rule 12(b)(2) motion that "[e]very allegation in the Complaint with respect to Mr. Gatto involves his acts undertaken, if at all, within the scope of his employment with adidas." (ECF No. 34-1 at 3.) Code likewise affirmed his intent to serve Adidas, both in conversations with Sood, (¶ 211(f)) and in his sentencing memorandum. (*See* ECF 56-4 at 16 ("[T]he actions taken by Mr. Code, which led to these charges, were both directed and encouraged by Adidas.").) Gassnola similarly admitted in testimony during the *Gatto* trial to paying five

families when he "worked for Adidas" and that the payments were made for Adidas's benefit. (ECF No. 56-9 at 17.) Therefore, their conduct clearly establishes Adidas's liability on a *respondeat superior* basis. (*See, e.g.*, ¶¶ 143-48 (Gassnola, Gatto, and Rivers's participation in scheme to defraud Smith Jr. and NC State); ¶¶ 153-54 (Gatto and Gassnola's participation in scheme to defraud Preston and Kansas); ¶¶ 155-164 (Gatto and Gassnola's participation in scheme to defraud DeSousa and Kansas); ¶ 165 (Code, Gatto, and River's participation in scheme to defraud Miami); ¶¶ 166-232 (Gatto, Code, Gassnola, and Rivers's participation in scheme to defraud Brian and UofL); *see also Helton v. AT&T Inc.*, 709 F.3d 343, 356 (4th Cir. 2013) ("[K]nowledge obtained by corporate employees acting within the scope of their employment is imputed to the corporation.") (internal quotation marks and citation omitted).

While Adidas asserts "there is nothing to suggest any adidas officer, director, or anyone other than the four adidas employees and agents named as defendants in this action were aware of the alleged activity," (Adidas Mot. at 17), the amended complaint pleads otherwise. (*See, e.g.*, ¶¶ 154(h)-(k) and Ex. 12 (approval by Adidas's Director of Finance of $90,000 payment used to bribe Billy Preston's mother <u>just six days after Adidas signed Gassnola to a contract limiting his maximum *annual* payment to $70,000</u>); ¶ 225 ($25,000 sham invoice emailed to Adidas's Director of Finance); Exhs. 52 and 53 (summary charts listing Adidas wire payments to Gassnola and corresponding payment approvals, including approval by Zion Armstrong (then co-head of Adidas America and currently its President) and Chris McGuire (Adidas America's Head of Sports Marketing); ¶ 205 and Ex. 54 ($75,000 invoice from Code for "consulting fee" and "travel expenses" approved by Adidas's Director of Finance, McGuire, and Armstrong two weeks after Brian committed to UofL); ¶ 265 (Adidas and its executives purposefully maintained a large, discretionary budget for its basketball marketing group in order to facilitate payment of the sham

invoices.").) Thus, its absurd for Adidas to now suggest its senior executives had no knowledge of this years-long racketeering scheme when those same people—who oversee all U.S. operations for the multibillion dollar, publicly-traded sports apparel company—repeatedly took time to personally review and approve invoices for "travel" and "tournament fees" incurred by a small high-school club basketball team in Western Massachusetts run by Gassnola, but apparently never once asked, "Why the heck did this guy send us a $90,000 invoice on January 4 seeking reimbursement for first quarter travel that hasn't happened for a trip to a tournament with a $500 entry fee when three days ago we agreed to limit his maximum annual payment to $70,000?" (¶¶ 154, 260-61; 265-66 and Exhs. 11-12, 15.) As the Fourth Circuit has observed in similar mail and wire fraud cases, "[t]his evidence alone could easily support the inference that [if Adidas's top executives were] unaware of what was happening around [them], it was because [they] deliberately shut [their] eyes to it." *United States v. Schnabel*, 939 F.2d 197, 203 (4th Cir. 1991) (affirming use of willful blindness jury instruction in mail fraud case).

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motions to dismiss and permit this case to proceed to discovery.

Dated: October 18, 2019

Respectfully submitted,

MCLEOD LAW GROUP, LLC

/s/ W. Mullins McLeod, Jr.
W. Mullins McLeod, Jr. (Fed ID No.: 7142)
Colin V. Ram (Fed ID No.: 12958)
H. Cooper Wilson, III (Fed ID No.: 10107)
P.O. Box 21624
Charleston, South Carolina 29413
Tel: (843) 277-6655
Fax: (843) 277-6660

Attorneys for Plaintiff Brian Bowen II